SUBJECT INDEX

	PAGE
STATEMENT	3
ARGUMENT	9
Agent in charge of business in place where injury occurred had no knowledge of alleged injury	23
The case law, State or Federal, does not support Petitioner	25
Foreman's knowledge not imputable to the employer	31
The claimed administrative construction can not alter the statute	35
Prejudice to employer from lack of notice	36
Both knowledge of agent in charge and no prejudice must be established	38
Court of Appeals correctly held that some satisfactory reason did not exist why such notice could not be given	39
CONCLUSION	46

LIST OF AUTHORITIES

CASES	PAGE
Andersen v. Jarrell, 157 Fla. 212, 25 So. 2d 490	28
Bellmeyer v. Dover Oil Co., 183 Okla. 11, 71 Pac. 2d 973	42
Bethlehem Steel Co. v. Parker, 72 F. Supp. 35, aff. 168 F. 2d 856	41
Borden's Dairy v. Sanders, 48 So. 2d 539	27
Christensen v. United States, 194 F. 2d 978	30
Collins Oil Co. v. Vaughn, 187 Okla. 101, 11 Pac. 2d 121	42
Fulton v. Hoage, 77 F. 2d 110	25, 26
Hinderliter Tool Co. v. Snyder, 103 Okla. 90, 30 Pac. 2d 558	42
Hoage v. Employers' Liability Assur. Corp., 84 F. 2d 715, cert. den., 299 U.S. 607, 78 L. Ed. 864	40
Hoage v. Royal Indemnity Co., 90 F. 2d 387, cert. den. 302 U.S. 758, 82 L. Ed. 600, 302 U.S. 776, 82 L. Ed. 602	25, 26, 40, 41
Lindsay v. Lawson, 98 F. Supp. 817	26
Maki v. Anaconda Copper Mining Co., 257 Pac. 171	29
Meehan v. Crowder, 158 Fla. 351, 28 So. 2d 435	28
N.L.R.B. v. Pittsburgh SS Co., 340 U.S. 498	47

CASES	PAGE
Oldman Boiler Works v. McManigal, 58 F. Supp. 697	25
Panama Refining Co. v. Ryan, 293 U.S. 388	46
Pillsbury v. United Engineering Co., 342 U.S. 197	13, 20
State v. Industrial Accident Board, 102 Mont. 435, 58 Pac. 2d 785	29

STATUTES

33 U.S.C. 907	11,12
33 U.S.C. 912	1, 2, 3, 14, 32, 36, 39, 44, 45
33 U.S.C. 913	12
33 U.S.C. 914	11, 15
33 U.S.C. 933	15
33 U.S.C. 950	12, 13, 15

MISCELLANEOUS

Workmen's Compensation Acts:	
Arkansas	41
Florida	41
Maryland	41
New York	41
Oklahoma	41

No. 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

HUGH A. VOBIS, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, FOR THE EIGHTH COMPENSATION DISTRICT, *Petitioner*,

VERSUS

CHARLES EIKEL AND B. D. HARRIS D/B/A SOUTHERN STEVEDORING & CONTRACTING CO. AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

TO THE HONORABLE JUDGES OF SAID COURT:

This case brings before this Court for review the notice provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 912. This section provides that written notice must be given to the Deputy Commissioner and to the employer within thirty (30) days after the date

of the injury. It is conceded that no such written notice was given in this case. (Petitioner's brief, p. 2)

In the absence of such written notice, the failure to give written notice is not a bar to a claim for compensation if certain statutory conditions are met. These are found in Section 12(d) of the Act (33 U.S.C. 912(d)):

> "(d) Failure to give such notice shall not bar any claim under this Act
>
> "(1) If the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice,
>
> or
>
> "(2) If the Deputy Commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given * * * "

The record is clear, indeed it is without dispute, that neither the employer nor the insurance carrier had any actual knowledge of the injury sustained by this man.

There is thus posed for this Court's decision these two questions concerning the two exceptions to the requirement that written notice be given within thirty (30) days:

1. Did the employer's *agent in charge of the business* in the place where the injury occurred have knowledge of the injury, and has any prejudice by the failure to give written notice resulted to the employer and carrier?

or

2. Is there some satisfactory reason why written notice could not be given?

With reference to the first question or exception, both knowledge of the injury *and* no prejudice by the failure to give written notice must exist before the failure to give written notice can be excused. If there has been either no knowledge or there has been prejudice, then the failure to give written notice cannot be excused under the first exception (33 U.S.C. 912(d)(1)).

Statement

After a careful review of the entire record, considered as a whole, both the District Court and the Court of Appeals for the Fifth Circuit (by majority decision) have expressly found:

(1) that the agent in charge of the business in the place where the injury occurred had no knowledge of the injury and

(2) that there was no satisfactory reason why written notice could not have been given.

Both the District Judge and the Court of Appeals for the Fifth Circuit expressly found that the identity of the employer and his agent in charge was undisputed in this record and that there was a complete want of any evidence that either had any knowledge of the injury (R. 230, 243, 244). Indeed, the District Court stated:

"All evidence is to the contrary." (R. 230).

Briefly, for the convenience of the Court, there is set out here the chain of command as it existed on board the vessel on the date of this alleged injury (not *ex post facto* at the compensation hearing as counsel for petitioner contends on p. 14 of the petition for writ of certiorari, nor

sub silentio as petitioner contends on p. 18 of his brief), but as supported by the testimony in the record as it actually existed on that particular day:

B. D. Harris—Employer—A contracting stevedore and one of the partners in Southern Stevedoring & Contracting Company—in charge of unloading ship.

A. P. David—Agent in charge of business when employer, Mr. Harris, not aboard the vessel—usually called stevedoring superintendent—only regular employee of Southern Stevedoring & Contracting Company aboard vessel that night.

R. J. Tarpey—Timekeeper—keeps time men work and handles clerical job of filling out injury reports—not regularly employed by employer but hired through Timekeepers' and Checkers' Union.

Ernest Wisby—Walking Foreman or Sub-Walking Foreman—not person in charge of unloading ship—not a regular employee of employer—no authority to send injured men to the doctor—a colored longshoreman hired to get work out of other colored longshoremen.

Lester Lovely—Gang Foreman of gang claimant was working in—no authority to send men to doctor.

Longshoremen—Men actually working in gang doing manual labor, including claimant.

The Court is of course familiar with the distinction between a stevedore who is specially skilled in stowing and discharging cargo from a vessel; and a longshoreman, who is unskilled and simply does the manual labor under the direction of the stevedore. Mr. Harris and Mr. David were the only stevedores on the vessel, all of the other men including Wisby being longshoremen doing the manual labor of discharging the cargo except Mr. Tarpey who was the timekeeper and checker.

The testimony of the various witnesses as to who the agent in charge of the business at the place where the injury occurred and what, if any, knowledge of the injury such agent had, was as follows:

Claimant EARL PORTER

1. Told walking foreman Wisby about injury aboard vessel. (R. 68, 94).
2. Told walking foreman Wisby about injury again two or three days later. (R. 91).

LESTER LOVELY

1. Was gang foreman. (R. 135).
2. Had no authority to send injured men to doctor. (R. 136).

ERNEST WISBY

1. Was walking foreman, or sub-walking foreman. (R. 127, 131).
2. Not a regular employee of Southern Stevedoring & Contracting Company but his employer changes from day to day. (R. 128).
3. Had no authority to send men to doctor. (R. 130).
4. Claimant told him he was hurt and Wisby told claimant to report injury to timekeeper. (R. 129).
5. Was not the person in charge of loading the ship. (R. 128).
6. Was not the head foreman, there was another fellow over him. (R. 130).

R. J. TARPEY

1. He was to keep time and also fill out injury reports. (R. 187).
2. Had no knowledge of injury. (R. 187, 188).
3. Walking foreman Wisby reported no injury. (R. 188).
4. After flash fire inquired if anyone was injured and informed no one was hurt. (R. 190).
5. He not a regular employee. (R. 188).

6. First knowledge of any injury was three weeks before November 10, 1950. (R. 189).
7. A. P. David was in charge of the work aboard the vessel. (R. 188).

A. P. DAVID

1. Was agent in charge of unloading the ship. (R. 193).
2. Had no knowledge of an injury and no report of an injury made. (R. 194).
3. Walking foreman Wisby did not report an injury to anyone. (R. 194).
4. Made inquiry about flash fire and no one said they were hurt. (R. 195).
5. Timekeeper normally makes out injury reports. (R. 195).

B. D. HARRIS

1. Was in charge of discharging ship. (R. 179).
2. A. P. David was agent in charge of work aboard vessel when Mr. Harris not there. (R. 179).
3. David was a regular employee of Southern Stevedoring & Contracting Company. (R. 179).
4. No report of injury made. (R. 180).
5. No knowledge of injury prior to July 13, 1950. (R. 180, 183).
6. Wisby was walking foreman, had no authority to send injured men to doctor and was not a regular employee. (R. 181).
7. Wisby had no authority to receive notice of injury there solely to get work out of the longshoremen of his race. (R. 182).
8. Saw Wisby twice after work on the vessel was completed and nothing said about an injury to anyone. (R. 183, 184).

As the foregoing summary clearly indicates, it is without dispute that Mr. A. P. David was the employer's agent in charge of the business in the place where the injury occurred. Petitioner contends that the walking foreman or

sub-walking foreman Wisby was the agent in charge. There is absolutely no evidence that the foreman Wisby was the agent in charge of the business. In fact, the Petitioner does not even so contend except by the argument that the word "business" means the "employee's work". That Wisby was not the agent in charge of the business of unloading this vessel is shown quite clearly by his own testimony, by that of the timekeeper Tarpey, by that of the stevedoring superintendent David and by that of the employer Harris. To sustain petitioner's contention that Wisby was the agent of the employer in charge of the business in the place where the injury occurred would require this Court to hold something which is plainly contrary to the undisputed evidence in the record.

Contrary to the impression which the petitioner seeks to leave in the brief, we are not concerned here with an illiterate and ignorant colored longshoreman who had no knowledge as to who was his employer or to whom his injury should be reported. The record shows clearly that on no less than two occasions, the man that the petitioner seeks to have designated as the employer's agent in charge, Wisby, expressly told the claimant that he, Wisby, was not the man to whom a report of injury should be made, but rather that it was someone else (R. 129). Wisby further informed the claimant that he had no authority to send him to a doctor and told him the name of the man that he would have to report to (R. 129, 130). In addition to this, on the Friday following the alleged injury of Monday, December 19, 1949, the claimant knew who his employer was from the pay envelope which he received. This left remaining at least twenty-five days in which he could have given written notice of his injury or brought actual knowledge home to his employer or to employer's agent in charge (R. 92, 93).

The case does not, therefore, involve an illiterate, colored longshoreman, "free from culpable neglect," and who con-

ducted himself "precisely as might be reasonably expected of one having suffered an injury in the course of employment." (See Petitioner's brief, pp. 19, 20.) Can it be said that he was free of culpable neglect, when the claimant was told on at least two occasions to whom the injury should be reported, and yet utterly failed to give the notice required by the statute? Can it be said that he conducted himself as might be reasonably expected when, within five days after his injury, he knew the exact name of his employer and yet took no steps whatsoever to give the notice required by the statute? Further, is it not the purpose of compensation acts and their procedural processes to eliminate, not compound, all of the common laws' uncertainties as to what a man "might reasonably do" or what is, or is not "culpable neglect"?

Nor is this a case in which the agent in charge of the business in the place where the injury occurred, David, was not readily available to receive this notice. The evidence is without dispute that the agent in charge, David, together with the Timekeeper, Tarpey, made inquiry at the scene of the flash fire immediately after it occurred, while the men were still coming out of the hold, to determine if anyone had been injured. Thereafter David and Tarpey got in a truck to locate the foreman, Wisby, and upon doing so, asked if anyone had been injured and were informed that no one had been injured. The record also clearly shows that both David, the agent in charge, remained available in the vicinity of the vessel until the employer, Mr. Harris, could arrive after driving from Houston, Texas, a distance of approximately fifty miles. During this time of approximately 2 hours, David, the employer's agent in charge of the business in the place where the injury occurred, was actually present and no notice or knowledge of an injury of any kind was received by him (R. 190, 195).

Argument

What is involved in this case for decision is not what some poor, illiterate colored longshoreman thought or could do (see p. 2, brief). Rather, it is, what the Congress meant by the plain language it used in Section 12(d) (1) of the Act, when it referred to the employer's "agent in charge of the business in the place where the injury occurred".

In respondents' view Congress was neither illiterate nor ignorant in speaking as it did; when it said "Agent in charge of the business" it meant precisely what it said.

As we understand the petitioner's argument (Summary of Argument I A, p. 9 of brief and Argument I A, p. 14ff of brief), it is contended that what Congress really intended to say was that the knowledge of the "immediate supervisor" of the injured employe was sufficient; that Congress meant that the words "agent in charge of the business" really, in fact were to be the same as "immediate supervisor". In short, even though there might be several gangs of longshoremen working at various places aboard a vessel with a stevedoring superintendent in charge, such as here, it is enough if the knowledge of the injury is brought home to the immediate supervisor of the particular employee who is actually hurt no matter how low or menial he might be in the hierarchy of employment.

The statute places the burden of giving notice of an injury on the injured employee and not on the employer. The statute says that written notice must be given to the employer or knowledge brought home to his agent in charge of the business. This duty and this burden is imposed on the injured employee.

However, petitioner contends that the employee has fully discharged this burden by simply telling his immediate foreman or immediate supervisor that he has been injured. With

these few magic words, petitioner not only hurdles the plain words of the statute on *when* and *how* and to *whom* notice must be given, but with equal ease shifts the burden of giving notice—imposed by statute upon the employee—from the injured employee to his immediate supervisor or foreman.

While the statute specifically says the employee must give written notice or bring knowledge home to the agent in charge of the business, petitioner insists that a simple oral statement by the injured employee to his foreman or immediate supervisor is a sufficient compliance with these statutory provisions. Thus, what started out as a duty of the employee is now neatly shouldered onto the employer, who, in addition to this extra visitation, is then castigated if any one of these alleged agents fails in passing on this "report" of the injury. Even worse, the employer, by this process, is required to set up a system or procedure to make certain that injured employees are given an easy, albeit non-statutory method of giving notice.

A variation of this position of petitioner is again openly stated (p. 14 of brief) where it is urged that the person who "directs the employee in his work" is the equivalent of agent in charge of the business.

How does the statutory phrase "in charge of the business" become the "person who directs employee's work" or "immediate supervisor of injured employee?"

Congress certainly did not use any such formula, nor is there anything about the manner of its saying to indicate that Congress really thought that Grant's words could be so easily made into Shoshone Falls.

Congress did not come into this problem of longshoremen's industrial protection without considerable experience in the operation of large scale, modern business enterprises.

The Congress must have realized that there would be foremen, walking foremen, or superintendents as well as

agents in charge of the business in the place where the injury occurred. Congress evidenced such awareness for it expressly made the knowledge of such a superintendent or foreman sufficient to charge medical expenses to the employer under Section 7(a) (33 U.S.C. 907(a)).

In short, when the nature of the injury was such as to require immediate medical treatment and services, the knowledge of the superintendent or the foreman and their failure to provide them was expressly sufficient to bind the employer for the emergency medical treatment immediately needed. However, when Congress dealt with the notice provisions of the Act, it very carefully used a different term; agent in charge of the business at the place where the injury occurred. Additionally, Congress completely failed to make any reference to a superintendent or a foreman.

When it came to giving notice of an injury sufficient to bind the employer, something which a man could take as much as thirty days to effect, Congress was careful to see that the knowledge be brought home either to the employer or to his agent in charge and not simply to a superintendent or foreman. This Court can hardly disregard the very different terms employed and read the Act as though those words either were not used or, worse, were not intelligently used.

There are many good reasons well supported by this record why it is essential to have notice of a high degree for compensation to become payable in contrast to a lower notice for emergency medical treatment. Medical payments for emergency treatment making the knowledge only of the foreman may well be imposed with no great risk. After all the Deputy Commissioner will have full power over future medical. As to the benefits (which are now analogous to a life-time accident policy under the 1948 amendments 33 U.S.C. 914 (m)), an employer is entitled to know, not

[illegible] must have knowledge imputed to him by what some employee might know whose job does not require him to know, handle, process and receive such notice and who does not have anything to [illegible] supervisory discretion with discretion.

Nor will petitioner's claim (Footnote 31, pp. 40, 41, [illegible]) at all do as an explanation that what is different is yet the same. Section 7(c) says, "Employer or his superintendent or foreman;" Section 12 says, "Employer or agent in charge of the business." Is it "fine print, technical distinction" to assert that two entirely different phrases, containing different words with different import, were purposely chosen to convey just that—a different meaning? On the contrary, petitioner is the one weaving gossamer webs with the wholly unsupported (Congressional hearings or otherwise) suggestion that Section 7(c) was thus expressed to circumvent the asserted fine print, common law rule of no authority in a superintendent to procure needed medical, or that a phrase so unusual in the law of agency, "agent in charge of the business", was needed to bring into the act the doctrine of imputed authority on ordinary principles of agency if that were the congressional intent.

That Congress deliberately chose not to use "superintendent or foreman" in the notice provisions is further shown plainly by the fact that the term in dispute, "or his agent in charge of the business in the place where the injury occurred" is used again in Section 30(f) (33 U.S.C. 930(f)). Section 30(f) provides that where written notice of injury has been given, or the agent in charge of the business in the place where the injury occurred has knowledge of it, and thereafter a report of the injury by the employer is not made to the Deputy Commissioner as required by the Act, then the one year period of limitation within which a claim can be filed does not begin to run until the employer has made such a report.

This is of special significance because Section 30(f), by its terms, can amount to an indefinite extension of the time (one year) in which claim must be filed (Section 13(a)). As petitioner points out (p. 44 of brief), the failure to file claim within the one year is non-excusable as this Court held in PILLSBURY v. UNITED ENGINEERING CO., 342 U.S. 197. But, the one year's time begins to run only if the *report* of injury is made and filed by the employer.

Surely, Congress must have intended that before an employer shall be exposed indefinately to the filing of a claim one, five or even ten years later, the person having an actual knowledge of the injury must be one having substantial responsibility and judgment in the employer's affairs.

If this knowledge (i.e. that fixes the time in which the employer must file the report) may be, as claimed by petitioner, imputed on ordinary principles of agency, or charged to the employer by a construction which equates "agent in charge" with the person having immediate supervision over the injured person's work, then the casual or accidental knowledge of a transitory gang foreman in a remote part of a ship's hold may expose that employer to the risk of an *indefinite* claim for an *indefinite* amount for an *indefinite* time.

Serious and heavy obligations on the employer in the form of civil and penal sanctions, thought by Congress to be essential to carry out the purpose of the Act, should ordinarily carry with them the correlative opportunity for means of actual, effective knowledge and compliance.

To construe the term otherwise would make the statutory provision one of "extension rather than of limitation", and the effect would be to "rewrite the statute of limitations at will and make what was intended to be a limitation no limitation at all" (Cf PILLSBURY v. UNITED ENGINEERING COMPANY, 342 U.S. 197 at pp. 199, 200).

A still further intrinsic proof that Congress was fulfilling its constitutional duty of legislating intelligently is the "King's English" in the setting of Section 12(d). Immediately preceding it is Section 12(c), which provides the manner in which the written notice (12)(a) and (b) shall be given to the Deputy Commissioner and the employer. Where the employer is other than a sole proprietor, the notice to the employer must be given:

> "(c) * * * If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred."

In other words, even assuming *arguendo* that the form of the notice, i.e., written or oral, may turn out to be unimportant, the important thing as to *either* form is that each must be given to the same person or to persons of equal status. If Congress had meant, as now suggested, that "in charge of the business" is merely a surplus, useless description of anyone having the status of agent under accepted ordinary principles of agency, why would it have been so precise (Section 12(c)) in referring to agents upon whom legal process could be served? The controverted phrase, "in charge of the business," follows this immediately and if it is all-sufficient, as now claimed, to comprehend all agents on the basis of imputation as well as those persons in immediate charge of the injured man's work, the specification of those of high process-serving rank was wholly unnecessary.

Moreover, this shows also that Congress felt it entirely consistent with the Act and its liberal purposes to make sure, in fact, that responsible persons having judgment, authority and the means of action on behalf of the employer were the ones to be notified of industrial injury.

Does not such a view comport with the serious obligations everywhere imposed in the Act upon the employer? For example, under the pain of serious penalties, either civil or criminal or both, the employer is required to report injuries within ten (10) days of time employer has knowledge of the injury (Section 30(a)(b)(e)); to begin payment of compensation within fourteen (14) days after employer has knowledge of the injury (Section 14(b)(e)(f)(g)); to comply with the Commissioner's Awards (Section 21(c)); to record all injuries and deaths (Section 29).

If this were the congressional purpose, how was Congress to express it? What words would have made the purpose any clearer?

Right off, Congress would have seen that the broad term "the person who directs the injured employee in his work" would, in any modern industrial enterprise, produce just the opposite result. Such a term states the management responsibilities wholly in relation to the particular injured person and limits the scope of management discretion and judgment to the single test of the direction of the particular worker's task.

Obviously, that test would permit anyone on behalf of the employer who was just one notch above the injured man to be infused with the vicarious power and responsibility of the employer. For example, the Longshoremen's Act applies to ship repairers. Suppose a super-liner, the SS UNITED STATES, is brought into shipyard for extensive overhaul, maintenance and repair and, as typical, to get the ship back into employment with the greatest speed, the work at hand is carefully laid out for the performance of numerous isolated jobs simultaneously; it would not be unusual for as many as 1,000 workers to be aboard the vessel at one time; in this situation, suppose further, that one particular job required welding in an isolated forepeak tank and the ship-

yard employer assigned two men, a Leading Welder and a Welder. The Leading Welder, by his title, is obviously in charge of the work and directs the assisting Welder in his work.

If the standard is the person who directs the work of the injured man, in the event of an injury to the assisting Welder, not otherwise reported by him in writing to his employer, and about which the Leading Welder failed to pass on the information to his next superior, the employer would be visited with all of these serious obligations, civil and penal.

Congress could see that any such express language would inevitably lead to that very situation. To have used any such express language would have meant the adoption of a substantive policy that notice was sufficient if brought home to those supervising the immediate physical operation of the injured man. This is the opposite pole to a substantive policy that the notice must be brought home to a level akin to management upon whom, after all, these obligations, civil and penal, rest.

Nor, for a similar reason, would Congress, with such an assumed substantive policy, have thought it permissible to use the term "foreman" or variations of it, "immediate foreman", "immediate supervisor", the person "exercising direct supervision over the injured employee", or the person "through whom dealings with the employer were to be conducted" by the injured man.

In the first place, any term, such as "foreman" or its variants is known to Congress to have a well fixed industrial acceptance and content. Its usage connotes a person who has the immediate direction of the physical operations being performed by laborers. In some callings, he is a "straw boss", in others, he may be a "tool pusher", in another, he may be the "bo's'n." The common denominator, however,

whatever the title, is the close and immediate relationship to the physical operation and the supervision of the manner in which those labor details are being carried out.

With such an accepted usage, Congress would have known that the express use of any such terms would naturally indicate a purpose to have notice sufficient if brought home to the working level. Obviously, had such express language been used, the only question for the administrative commissioner or the reviewing court would be whether the person to whom the oral notice was given had the status of foreman and the duty of physical direction of the labor. The use of any such express terms would, therefore, have been manifest evidence of a policy determination by Congress that the employer was to be visited with these heavy obligations, civil and criminal, on the strength of knowledge possessed by laborers not having any general management discretion, judgment or authority and whose subsequent reporting or non-reporting of the information thus gained was to be wholly at the risk of the employer.

If, on the other hand, it was the congressional purpose to charge the employer with these serious burdens only if knowledge is brought home to the employer through a strata having at least some characteristics of management judgment and responsibility, it is quite plain that Congress could not have chosen such language. If it could not and would not have used such express terms, upon what basis can the intent be imputed that quite different language was nevertheless intended to imply such purpose?

The same results are reached in analyzing the possible use of other suggested terms, such as "agent" or "representative". We discuss the matter of imputed knowledge on the principles of agency elsewhere. Here, we are concerned with reasons why Congress must be deemed to have deliberately used the phrase "agent in charge of the business" rather than

any such terms. First, such terms, by their nature, are broad and indefinite though commonly found throughout the law commercial. Congress would have known that the use of any such express terms would have brought into the application of the statute not only the uncertainties of the common law acceptance on principles of agency, but, conceivably as well, a recognition that many state workmen's compensation acts and the interpretation placed upon them by the respective state courts made the question of notice to the employer a matter of bringing it home to one in the strata immediately supervising and directing the physical labor (See, for example, the discussion, Petitioner's brief, pp. 22-24, and Footnotes 14, 15, 16).

If Congress had really intended that the employer was to be charged with the serious and heavy obligations on the mere notice to one having no management discretion, judgment, responsibility or capacity to act for the overall performance of the job under way, why would it not have used these very terms? Would not that have eliminated any doubt? Would that not have, as pointed out here, made it crystal clear by the words themselves and by the implied adoption of the approach of many state compensation acts together with the interpretation of their respective courts?

If that is so, then what meaning is to attach to the use of completely different language by Congress? Is it reasonable to think that if holding such an assumed substantive policy, Congress would reject terms of ordinary common usage, or discard as unsuitable language found in numerous state acts all of which were comprehensively before the Congress in its effort to fill the gap for maritime workers?

Is not the most sensible and logical conclusion from the use of specific and different language that Congress deliberately had something else in mind to accomplish?

The ridiculous extent to which this process of wishful legislating goes is reflected in petitioner's argument (Foot-

note, 19 p. 25 of brief) on the New York Compensation Act. As petitioner points out, the Longshoremen's Act was patterned after the Workmen's Compensation Law of the State of New York. When the Longshoremen's Act was passed by Congress in 1927, the notice provision of the New York statute provided that written notice was excused if the person "having immediate supervision" of the injured employee had knowledge of the accident.

Now petitioner argues that as this difference in terminology between the New York Act and the Longshoremen's draft was not the subject of congressional comment, debate or report, it may be "reasonably inferred" that the draftsmen considered them to be the equivalent!

This sort of construction is a comfortable escape from the English language, the plain meaning of words and the equally plain habit of writers, judges and legislators, that when different words are used, a different sense is intended.

We think the fact that Congress deliberately selected the language "agent in charge of the business" rather than the New York terminology or the other suggested implied meanings discussed, reflects a determined purpose to effectuate its own policy and as such the phrase fits in with the Act as a whole and the use of that term elsewhere in the Act.

Congress used the language "or his agent in charge of the business in the place where the injury occurred" in three different sections of the Act. (See 12(c) and (d), Sec. 30(f)). It specifically referred to "superintendent or foreman" in still another section of the Act. Nowhere did it refer to "person having immediate supervision of the injured employee" or similar language urged upon us by petitioner. How can that add up to a claim that the language used can be avoided because it produces what some assert is a hardship in an individual case?

But that is precisely what the petitioner seeks to have this Court do—amend the statute so that there shall be added the words "superintendent or foreman" or "person having immediate supervision."

Exactly the same attempt was made with reference to another section of the Longshoremen's and Harbor Workers' Compensation Act by the Bureau of Employees' Compensation in the case of WARREN H. PILLSBURY v. UNITED ENGINEERING COMPANY, 342 U.S. 197, decided on January 2, 1952. This Court rejected the claim that it had the power to change the statute. The Court, through Mr. Justice Minton, said (at p. 199, 200):

> "We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability' * * *.
>
> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

The teaching of this decision has been followed by the Court of Appeals for the Second Circuit in CHRISTENSEN v. THE UNITED STATES, 194 F. 2d 978 (decided February 6, 1952).

We have demonstrated above that had Congress fixed in its mind the substantive policy of notice through the level

of workers immediately over the labor, it would have found the traditional and usual terminology quite adequate. In that process we also pointed out why, if Congress had an opposite substantive policy, the use of any such traditional terminology would not do. Now we approach the matter affirmatively from this position: Assuming Congress intended as a substantive policy to saddle an employer with these heavy obligations only if, in some realistic sense, knowledge was brought home to the employer thus charged, what language would have been better suited than the phrase "agent in charge of the business"?

"Business" obviously carries with it the idea of the whole operation under way at the place where the injury occurred. In this respect it shows a studied purpose on the part of Congress not to freeze out bona fide claimants by requiring that they deal with executives highly placed at remote offices. Congress recognizes that each industrial activity of the employer shall stand on its own feet.

Consequently, an employer whose operations are varied and comprehensive, scattered over an entire port or amongst ports in many states or places, cannot escape a responsibility by seeking to send the injured employee elsewhere to other or remote places. The statute charges the employer with the risk of having each industrial operation in the hands of one sufficiently trustworthy to pass on this and other information.

Since the only activity of importance under the statute is that of the employer, the reference is, of course, to the employer's business. The employer's business is much more far-reaching than each particular or isolated piece of work being done on the job site.

For example, in stevedoring operations, the employer's business is the loading or the discharging, or both, of the entire ship. Work consists from time to time in the handling

of, say, bales of cotton in one hold, carbon black in another, or steel pipe in another. Such work is concerned immediately only with the physical handling in or out of such cargo in such places. The business of the employer, however, in that operation is the complete whole, of which the hiring and firing and directing of labor is but a part. It would comprehend, in addition, for example, the proper laying out of the cargo plan in conjunction with the ship's officers to achieve seaworthiness, the orderly calling down of cargo to be available as and when needed at the ships cargo tackle, arrangements for necessary dunnage, hiring or assembling of the needed gear and stevedoring appliances, the reporting to ship's officers or steamship company of the progress of the work from time to time, the care and handling of cargo damaged and a myriad of other details.

It was the person who had those responsibilities that, we think, Congress meant in describing him as the "agent in charge of the business." In short, it is whoever is there on the job as a whole in its industrial sense speaking for the employer and making his decisions.

Actually, Congress displayed great wisdom in the use of such a term. The test is stated not in the jargon of the lawyer, not encumbered with the continuous process of common law interpretation; rather, it is stated in terms of the industrial activity which Congress sought to protect and cover. It wanted a simple standard under which both employer and employee could readily work. It asks the simple question only: Who is running this operation for the employer?

By this means an injured employee would know to whom he must go. And, on the other hand, the employer would not be exposed to this risk of severe burdens, civil and criminal on the strength of some information informally or even casually acquired by some employee out of, perhaps,

hundreds at work on the job-site who happened, (perhaps accidentally at the time), to have at least one man under him in the performance of some labor task.

When the terms "agent in charge of the business" is construed in the light, analyzed herein, of a purpose of Congress to fix a policy different from that of many of the states, and when the term is looked upon in its natural meaning as a description of an important managerial element in the modern industrial enterprise, it becomes clear that neither a gang foreman nor the walking foreman nor the timekeeper can satisfy the characteristics of that position. On this score the record remains as it has always been, an undisputed one, that the stevedoring superintendent, David, was the only person qualifying as agent in charge. The record is equally clear, he had no knowledge of the alleged injury.

Agent in Charge of Business in Place Where Injury Occurred Had No Knowledge of Alleged Injury

To sustain the Deputy Commissioner's finding that the *agent in charge* of the business in the place where the injury occurred had knowledge of this injury this Court will have to hold that the walking foreman, Wisby, was the agent-in-charge.

As both the District Court and the Court of Appeals have already held upon a careful review of the entire record, this walking foreman, Wisby, was not the employer's agent in charge of the business in the place where the injury occurred. Wisby himself denied he was the agent in charge of the operations aboard the vessel. (R. 128, 130).

It is undisputed that the business of the employer in the place where the injury occurred was the discharging of this particular vessel of its cargo. The question is thus posed:

Who was the agent in charge of discharging this vessel? Was it the unsupervised and unskilled manual longshoreman, Wisby, as contended by the petitioner, or was it, as found by two courts below, a man who was trained and skilled as a stevedore and who was expressly left there to handle direct and control on the employers' behalf all of the operations aboard the vessel?

It is undisputed in this record that Wisby the walking foreman, was an unskilled, manual laborer, just as was the claimant. Neither of them was aboard the vessel for the purpose of handling any of the numerous problems which arise as to the method of discharging, the starting or stopping of the discharging of cargo and each of which involve the necessity for management responsibility. They were aboard simply to assist in the manual labor involved in the cargo operations.

On p. 19 of the petitioner's brief, an attempt is made to imply that the walking foreman, Wisby, was present aboard the vessel at the time the injury was sustained directly supervising the unloading operations, while the agent in charge, David, was elsewhere on the vessel. An attempt is made to leave the impression that the walking foreman, Wisby, was actually aboard the vessel directly supervising the unloading operations. However, such was clearly not the case, for in his own testimony, Wisby stated that he was not even aboard the vessel at the time the injury was allegedly sustained, but instead had gone ashore for some water and when he returned, all of the men were out of the hold, off of the vessel and on the wharf (R. 128, 129).

Some reference is also made to the fact that Wisby "hired" the claimant and was responsible for paying off the men on behalf of the employer. All of these men, including the walking foreman, Wisby, were hired through the In-

International Longshoremens' Association (ILA) union hall. The men knew that Wiley controlled those men at the union hall for work aboard the vessel and as a later time, in his capacity as a union official, delivered to each of the longshoremen their pay envelopes cannot raise his status to that of an employer who hired and fired the men. It is simply a coincidence in this case that the union official who assembled the gang to work aboard the vessel, and who later delivered their pay envelopes to them, also served in the capacity of walking foreman aboard the vessel (R. 183, 184). In any case the person who merely performs the mechanics of hiring or firing is something much less than the agent in charge.

Wherever the construction given to the term "agent in charge", the evidence is uncontradicted that, during any absence of Mr. Harris, the employer, Mr. A. P. David was, in fact, the only man actually directing, controlling, supervising and in charge of the entire unloading operation on board the SS SOUTHERN STATES at Texas City. (R. 179, 188, 193).

The Case Law State or Federal Does Not Support Petitioner

In the twenty-six years that the Longshoremen's and Harbor Workers' Compensation Act has been in existence, only four cases have been considered by the Courts in which this portion of the notice provisions of the Act has been considered. See:

Fulton v. Hooge, 77 F. 2d 110 (Ct. of App., D.C. 1935);

Oldman Boiler Works v. McManigal, 58 F. Supp. 697 (D.C. N.W., 1944);

Lindsey v. Lawson, 93 F. Supp. 817 (D.C. Fla., 1950);

Hooge v. Royal Indemnity Co., 90 F. 2d 387 (Ct. of

[redacted]

[redacted]

[redacted]

[redacted]

Mathes v. Crowder, 118 Fla. 311, 28 So. 2d 435 (1947);
Anderson v. Jarrell, 157 Fla. 212, 25 So. 2d 490 (1946).

It is interesting to note that petitioner mentioned in the brief the MERRIAM case and the ANDERSON case. (See pp. 28, 29, Petitioner's brief), but remained silent as far as the BONNER'S DAIRY case is concerned.

Petitioner's effort to twist the MERRIAM case to make it appear on the face to be a close parallel of our situation will not do. A glance at the opinion will readily show that the foreman in the MERRIAM case did not stand idly by without taking any action when informed of the employee's injury. Indeed, the foreman in the MERRIAM case expressly rejected the employee's claim because he had not sustained an accidental injury. No other facts appear in the MERRIAM case to indicate the nature of the foreman's duty or just what his status was as far as the employer was concerned. But it certainly seems clear from the facts given in the opinion that this foreman apparently had been given the authority to receive and to *reject* claims for compensation on behalf of the employer. At least this was one of the main points relied on by the Florida Court in holding that the notice to that particular foreman was sufficient. It is undisputed that Wisby had no such authority here and expressly told the claimant so as soon as the alleged injury was reported.

The MERRIAM case cited the ANDERSON case, with approval. In the ANDERSON case, the person who had knowledge was the person who was actually in full control of and operating the sawmill for the employer while the owner was overseas during World War II. The operator (to whom notice was given) of this sawmill was the brother of the owner who was overseas. The ANDERSON case indicates quite clearly that the Florida Courts are going to require

that the agent in charge of the business in the place where the injury occurred be one who is in actual operating control of the enterprise. Obviously this case was in contempt of the industrial society and he meets the standards we suggest.

The latest opinion of the Florida Supreme Court on this question, and which petitioners have overlooked, is the Bonner's Dairy case. There the Court held that knowledge of the "claimant's superior then in charge of operating the dairy" was sufficient. This is another clear manifestation that under an identical statute, the Florida Courts strictly require notice to the person who is responsible for the direction of the whole enterprise and not simply to an immediate supervisor or foreman of the particular labor being done by the injured employee.

We think even a casual reading of these three Florida cases will clearly convince this Court that were our case before the Florida Supreme Court, exactly the same result would be reached as by the two Courts below.

The Montana statute is the only other Workmen's Compensation Act which has language that is anywhere near the same. The Montana statute requires knowledge of the "managing agent or superintendent in charge of the work upon *which the injured party was engaged.*" (Italics ours). The Montana Supreme Court has determined this matter on only one occasion, but has had the question before it on at least one other occasion when it disposed of a case on other grounds. (See STATE v. INDUSTRIAL ACCIDENT BOARD, 102 Mont. 451, 19 Pac. 2d 781 (1936)).

The only case in which this question has been decided by the Montana Supreme Court was MAKI v. ANACONDA COPPER MINING COMPANY, 287 Pac. 171 (1930). In that case the Montana Supreme Court held that the knowledge of the claim agent and safety engineer was not sufficient

since they were not the employer's "managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of the injury." From this case it also abundantly appears that the Montana Court would reach the same result that the District Court and the Court of Appeals for the Fifth Circuit did upon the fact situation here.

It is significant that the Montana statute describes the agent in terms relating directly to the injured empolyee, i.e., superintendent in charge of the work of the injured man upon which he was engaged at the time of injury. No words are used to suggest one having the control of the whole operation or enterprise at that particular job-site.

As petitioner acknowledges in the brief, the other workmen's compensation laws of the remaining states are of no real benefit here since only these two states have statutory language which is at all similar to the Longshoremen's Act. Under these other state statutes, the question of imputed knowledge from foremen, agents, representatives, superintendents, etc. to the employer is clearly pertinent in their interpretation and application by the respective states, for there is no statutory standard or limitation on the status or capacity of the person who can receive the notice such as that which Congress has incorporated in the Longshoremen's Act.

The mere fact that there may be many state court cases which permit notice to a foreman as sufficient is of no significance here, since they are decided under statutes which contain no language similar to the phrase in dispute.

"Agent in charge of the business" has a qualitative content requiring that a person measured under it be, in fact, standing in the stead of the employer at that place and in the control of the whole operation at that job-site. This

judgment, discretion and authority to do, act and decide on behalf of the employer is not determined by titles but rather by actual capacity. On this record it was undisputed, and both courts so affirmed, that David alone met these requirements. The fact that Wisby was designated as a "foreman" does not matter. On the undisputed fact, his was a limited, restricted authority and direction and was, without dispute, at all times subject to the overriding judgment, direction, discretion of Mr. David, who was there, on the job, superintending it.

Petitioner must fail, therefore, because it urges an untenable construction of the controverted phrase. It must fail also because on the factual controversy, both the District Court and the Court of Appeals have expressly held that on the whole record, there is no evidence that Wisby was the agent in charge. Indeed, as the District Court stated, all of the evidence is to the contrary.

Foreman's Knowledge Not Imputable To The Employer

Petitioner next contends that even if (a) the employee's immediate supervisor is not the agent in charge of the business, even if (b) such agent in charge of the business has no knowledge of the injury, it is nevertheless sufficient if some lesser employee, such as a foreman, has knowledge; for such knowledge of the lesser employee is then imputable to the employer (See Summary of Argument, Petitioner's brief, I B, p. 11 and Argument, Petitioner's brief, I B, p. 30 ff). Petitioner contends that the knowledge of the foreman or some lesser employee is imputed "under familiar principles of the law of agency."

To carry this argument to its logical conclusion, any knowledge acquired by any of the employer's employees aboard the vessel that night would be imputed to him for

they, like the foreman, are agents or representatives of the employer on that particular job. If ordinary principles of agency are to be applied here, the knowledge of *any* longshoreman, indeed, perhaps even the claimant *himself*, would be imputable to the employer.

The question then recurs:

If the ordinary principles of imputed knowledge of the law of agency were to be applied, why did Congress use the statutory term "agent in charge of the business in the place where the injury occurred?"

As heretofore pointed out, Congress had other workmen's compensation laws to use as its guide. Included among these were many that followed the imputed knowledge theory which petitioner urges here. Where Congress rejected all such statutes why must we assume that it intended thereby to adopt them impliedly—why is not the opposite inference more reasonable?

As we have pointed out above still further insight into what Congress meant by the term "agent in charge of the business in the place where the injury occurred" is found in Section 12(c) of the Act (33 U.S.C.A., Sec. 912 (c)), which says in part:

> "* * * If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any *agent* or officer thereof upon whom legal process may be served or who is *in charge of the business in the place where the injury occurred.*" (Emphasis supplied)

This subsection of Section 12 relates to the persons to whom written notice of an injury, can be given. It is particularly significant that Congress has used the same phraseology here as it used in the next subsection (12(d)). This is a clear manifestation by Congress that the agent in charge

of the business in the place where the injury occurred is on a substantial parity with agents on whom service of process can be had. It manifests the Congressional intent that specific standards of imputation were being fixed; that for these purposes only that strata of representatives would bind the employer who had, for that particular industrial activity management direction and control.

The contention by the petitioner that the knowledge of the walking foreman, Wisby, was imputable to the employer or to the agent in charge is an attempt to completely ignore the notice provisions of the Act. It is an attempt to make what was intended by the Congress to be a limitation on who could receive notice for the employer no limitation at all.

The phrase "or his agent in charge of the business in the place where the injury occurred" was, as the statute plainly and clearly indicates, a limitation specifically set by the Congress to give the Courts, the Deputy Commissioners, indeed, even the Bureau of Employees' Compensation, a guide on which to base their determinations on the question of notice. To hold that the knowledge of the walking foreman, Wisby, is imputable to the employer or to the agent in charge is simply a subterfuge to evade the plain statutory mandate of the Congress. Had Congress intended that the knowledge of someone less than the agent in charge should be sufficient under the notice provisions, it is only reasonable to expect that they would have expressly included this language in the Act, and that they would not have relied on the Bureau of Employees' Compensation or the Courts to extend it by judicial interpretation.

Nor is there any real merit in petitioner's contention that by making Wisby a foreman, it placed him there in the stead of the employer for any and all purposes. Petitioner contends that having so made him foreman, the employee

had a right to assume that he was an agent for all purposes to receive notices of injuries, etc. (Petitioner's brief, pp. 31, 32) The evidence is uncontradicted that Wisby had no authority from the employer or anyone else to receive notice of injury. Indeed, Wisby himself so informed the claimant-employee immediately upon his first acquiring knowledge of a claimed injury. It is not a situation in which a foreman has been set up over a group of men and tacitly or otherwise they have come to know him as the sole representative of the employer.

It is thus not a case where the employer has achieved a "total exemption from liability for the misfeasance or nonfeasance of his agents." Nor is it a case in which employees, "not being clairvoyant * * * assume that the foreman is in fact what he appears to be by virtue of the job he holds * * *." (Petitioner's brief, p. 31). These and the other considerations (pp. 32-34, Petitioner's brief) are quite beside the point. Whether workmen customarily deal with their foreman, whether they usually take matters up through that channel, whether an employer can rightfully insist that laborers carry out the orders of a foreman in charge of their task, whether an employer does or does not have some means for disciplining employees in a channel of intelligence for failure to report, has nothing to do with this problem. Indeed, such considerations are calculated to divert attention from the statute which imposes a specific kind of duty upon the employe to make specific kinds of notices in specified ways and times. If these considerations are followed, then why should Congress legislate at all on the manner in which notice is to be given or knowledge brought home to the employer?

These arguments try to paint it as a duty on the part of the employer to go above and beyond the statutory scheme and establish a procedure for reporting injuries, police it and

supervise it to make sure that it works, and then bear the risk of any failure.

The statute prescribes how and when notice shall be given. It provides under what circumstances it may be excused. The employer is not to be scourged for asking the Court to enforce the law. Especially so where, as here, there is no warrant for any suggestion that anyone was misled. Of all of the facts clear in the record is the uncontradicted testimony of Wisby that he told the claimant he, Wisby, had no authority to receive a notice of injury.

The Claimed Administrative Construction Can Not Alter the Statute

We are quite at a loss to understand the official advice from the Assistant Solicitor of the Department of Labor in the Employees' Compensation Division (Petitioner brief, pp. 34, 35) that since 1927 Deputy Commissioners have universally accepted notice to the employee's immediate superior. First, it is not in this record. We have no way of testing it. Second, and more important, it has no place in this problem.

Actually, as pointed out in our brief in opposition to Application for a Petition (p. 9, Footnote 1), this is not the problem of universal recurrence having major transcendent importance in the further administration of the Longshoremen's Act. The issue has arisen but five times, including this case, and in none of the reports to Congress has it ever been suggested that the statutory terms employed by Congress thwart its legislative will.

But these considerations aside, the implication of this "official advice" is again to put the burden upon the employer to make him establish a system not required by the statute and then subject him either to the risks of failure

of any such unofficial procedure, or an attack that it cannot be the law because no one follows it.

We have felt it entirely proper to stand upon the notice requirements of Congress because, if for no other reason, as we point out in discussing the actual prejudice in this case, no two people can tell even remotely the same story about this alleged injury. Worse it was not until seven months later that the employer got the opportunity of treating the man. Were this a claim against the government under any one of the three waivers of statutory immunity, we have no doubt that our able opponents would have vigorously denied the injury or its disabling effects, and we would have fully supported them in such defense.

The suggestion that "injustice" must be overcome by following an unproved administrative practice wholly at odds, or at least completely unexplained in the face of plain statutory language, seems to be the last straw in this effort to remake the Longshoremen's Act.

Prejudice to Employer From Lack of Notice

If the Court determines that the agent, Wisby, was not the agent in charge of the business in the place where the injury occurred, then there is no necessity to consider the question of prejudice. The question of prejudice becomes immaterial since failure to give written notice is excused under Section 12(d)(1) (33 U.S.C.A., Sec. 912(d)(1)) only where both exist.

Little comment seems necessary here, for the plain and open prejudice to the employer and the insurance carrier in this case is amply demonstrated. It is demonstrated by their inability to obtain the facts with reference to this injury while they were still fresh in the minds of the witnesses to thus determine whether the claim was genuine or, on the other hand attempt to prevent a possibly fraudulent

or false claim. It is demonstrated by the inability of the employer to furnish prompt and proper medical care and attention so as to reduce the injured man's disability to a minimum. These things were all brought about directly by the claimant's failure to give the notice required under the Act. These are valuable rights of the employer-insurance carrier and are not to be lightly rejected.

The inability later on to ascertain the facts was graphically illustrated by the many different versions of claimant's injury as related by the various members of the longshore gang called as witnesses at the hearing held November 10, 1950 (11 months after the alleged injury of Dec. 19, 1949). The many irreconcilable versions were:

(1) Hurt coming out of hold (R. 129);
(2) Fell down on some dunnage (R. 136);
(3) Fell ten or twelve feet off of ladder into hold (R. 150);
(4) Fell or plank flew up and hit him (R. 157);
(5) Fell fifteen or twenty feet off a ladder (R. 166);
(6) Claimant's version—bullion fell and hit a standard which fell on him (R. 78).

Only prompt investigation would enable an employer to ascertain with fair reliability whether such an injury occurred. A "hearing" based on such palpably unreliable recollections is hardly sufficient substitute.

In addition to this, the claimant received no medical care and attention of any significance throughout the entire period or more than seven months from the date of his injury until formal notice was given to the employer and insurance carrier.

After the lapse of a period of six or seven months, even the claimant himself could not remember the date of his

alleged injury. In his testimony, and on various occasions, he gave at least four separate and distinct statements. (R. 119, 122, 99, 84, 91).

Who brought about this irretrievable uncertainty of the truth? Not the employer or the insurance carrier. All must be charged to the claimants own failure to give the notice required under the Act. When the employer is unable even to really ascertain the truth; where the "hearing", as here, demonstrates that time has erased the means of knowledge, then prejudice is present and real.

Both Knowledge of Agent in Charge and No Prejudice Must Be Established

Under the first exception to written notice, there must be a showing both that there has been no prejudice to the employer and that the employer's agent in charge of the business in the place where the injury occurred had knowledge of the injury. If either of these two requirements is not complied with, then this exception to written notice cannot be sustained. In other words, if there were prejudice, even though the employer's agent in charge had knowledge, this exception would not excuse lack of written notice. On the other hand, if the employer's agent in charge had no knowledge, even though there were no prejudice, the exception could not be sustained.

To sustain the Deputy Commissioner's finding with respect to this exception would be to rewrite the plain provisions of the Longshoremen's and Harbor Workers' Compensation Act. It would impose upon the stevedoring company an impossible task in keeping records of injuries and promptly reporting them to the Deputy Commissioner as required by the Act. These walking foremen are simply union members, hired at the Union Hall from day to day, and they are men over whom the employers have no con-

trol after they leave their employ on each given day; men who are sent to their day's employment by a union in such a way that the employer has no opportunity to accept or reject; and men whose dependability in reporting injuries, the employer has no opportunity to ascertain. These men may be employed by one employer one day as walking foremen and do no more work for him for many weeks, indeed, perhaps for many months, or they may return as workers only. That such men are not the agents in charge within the meaning of the Act is plain and uncontradicted in this record.

Court of Appeals Correctly Held That Some Satisfactory Reason Did Not Exist Why Such Notice Could Not Be Given

The petitioner finally asserts that the Deputy Commissioner has the power in his discretion to excuse a failure to give this notice for some reason satisfactory to him, and in effect, that this exercise of discretion is not judicially reviewable.

In short, what petitioner says is that the Deputy Commissioner's power to excuse for some satisfactory reason invested the Deputy Commissioner with unlimited and unguided power to excuse or refuse to excuse as the Court of Appeals said, according to his "whim or caprice." (R. 244).

We call the Court's attention once again to the language employed by Congress in the Longshoremen's Act. The statute provides that the failure to give written notice can be excused "on the ground that for some satisfactory reason *such* notice *could not* be given" (33 U.S.C.A., Sec. 912(d)(2)). The terminology employed here, "could not be given", is of particular significance. Congress did not say that the failure to given written notice could be ex-

cused for some satisfactory reason why such notice was not given.

We are here again confronted with petitioner's contention that once the claimant reported his injury to the foreman, this was all that could be reasonably expected of him. Petitioner insists that as claimant reported the matter to the foreman (Wisby) it was not necessary to give any other notice.

While the purported findings of fact made by the Deputy Commissioner, which he considered to be some satisfactory reason why the notice could not be given, are good "jury argument" designed to arouse the sympathy of a reviewing court, for the most part, they have no bearing whatsoever on this particular matter. In fact, some of them are even contrary to the undisputed evidence.

The most that can be said for the Deputy Commissioner's finding in this regard is that the claimant was not a regular longshoreman, could not read nor write, except to sign his name, and these, we submit, are wholly insufficient to constitute some satisfactory reason why written notice could not be given. The ignorance and illiteracy of this colored longshoreman may well account for petitioner's assumption that he had no knowledge as to the notice provisions of the Act, but there is certainly no evidence in the record to sustain any such finding. If ignorance can excuse noncompliance with one law, or part of the law, why is he bound by any other?

This particular question has been considered by the Court of Appeals for the District of Columbia on two separate occasions. See:

Hoage v. Employers' Liability Assurance Corporation, 64 F. 2d 713 (Ct. of App., D.C., 1933), certiorari denied, 290 U.S. 637, 78 L. Ed. 554;

Hoage v. Royal Indemnity Company, 90 F. 2d 387

(Ct. of App., D.C., 1937), certiorari denied 302 U.S. 736, 82 L. Ed. 569, rehearing denied 302 U.S. 774, 82 L. Ed. 602.

The Court of Appeals for the Fourth Circuit has considered the question of a satisfactory reason for failure to give this notice in BETHLEHEM STEEL COMPANY v. PARKER, 72 F. Supp. 31 (D.C., Md., 1947), affirmed 163 F. 2d 534 (4 C.C.A. 1947).

In all three of the foregoing cases, the nature of the disability and its relation to the employment were not known to the claimant, and in each of them, this was held to be a satisfactory reason why such notice could not be given.

From our detailed check of the statutory provisions in the Workmen's Compensation Acts of the forty-eight states, it appears that only six states have provisions on this satisfactory-reason question comparable to that of the Longshoremen's and Harbor Workers' Compensation Act. The language in the Florida statute (F.S.A., Section 440.18), and the Arkansas statute (Ark. S.A., 1947, Section 81-1317(d)(3)) is exactly the same, while the statutes of Maryland (ANNO. CODE OF MD., Article 101, Section 30), (NEV. COMPILED LAWS, Section 2716(1)), New York (N. Y. WORK. COMP. LAW, Section 18), and Oklahoma (85 OKLA. STAT. ANNO., Section 24), excuse the failure to give written notice if there is some "sufficient reason" that it could not be given.

The annotated statutes in these six states have been checked, and while there are many cases in which the language of the statute is used and an award affirmed or reversed, the cases either digress on some other statutory grounds such as no prejudice to the employer, or the facts which constituted a satisfactory reason are not shown in the opinion. This check involved the reading of all of the cases that could be found in the annotated statutes and

other sources from these states, including more than eighty decisions from Oklahoma, over thirty from New York, and lesser numbers from the other states.

Under a comparable statute, the Oklahoma decisions hold that a claimant is charged with knowledge that he is required to give notice in writing of any injury within thirty days, and that the failure to give such notice is a bar to any claim under the act. See:

Bellmeyer v. Dover Oil Company, 181 Okla. 11, 71 Pac. 2d 973 (1937);
Hinderliter Tool Company v. Snyder, 163 Okla. 10, 20 Pac. 2d 518 (1933);
Colins Oil Company v. Vaughn, 157 Okla. 101, 11 Pac. 2d 121 (1932).

To follow the contentions asserted by the petitioner here that a man's illiteracy, his transitory employment as a non-regular longshoreman and, lack of knowledge of the notice provisions would destroy the very policy behind the requirement that that notice be given. The cases heretofore considered by the Federal Courts show quite clearly what is meant by the statutory phrase "some satisfactory reason why such notice could not be given." It means something such as not knowing the nature of the disability, or the medical consequences and its relation to the employment. It means a situation in which the claimant is ignorant of a matter of *fact*, that is, that the injury was in *fact* the origin of a disabling condition or that a disabling condition was in *fact* caused by an injury sustained in his employment. No such facts exist in this case, for the claimant admits that he knew from the date of the alleged injury that his disability was caused by the injury.

Since the mandate of the statute is positive that written notice of injury is required and is excused only on the stated conditions, there must be a full compliance with them. It

is important, then, to emphasize that the only notice which is excused under the second proviso of subsection (d) is the *written* notice. The Act provides:

> "(d) Failure to give *such notice* shall not bar any claim under this Act * * *.
>
> (2) If the Deputy Commissioner excuses *such failure* on the ground that for some satisfactory reason *such notice* could not be given * * *." (Italics ours)

The failure excused under the second proviso is the failure to give the notice, i.e., in writing, provided for under Sections (a), (b) and (c). Further, "such notice" refers to the notice in writing required under those subdivisions.

It is not enough, therefore, to gain the exemption of the second part of subdivision (d) to establish some satisfactory reason for not giving further or other *oral* notice. Hence, whether it was reasonable for him to give notice to Wisby, the foreman (who, incidentally, declined to receive it), rather than to David, the man actually in charge of the entire operation for the employer, is of no real moment here. This proviso does not even purport to deal with the failure to give any or all oral notices. It is distinctly confined to the specific written notice.

With the Court of Appeals, then, can we rightfully ask: Where is the evidence of any reason why *written* notice *could* not be given? Certainly, none of the "reasons" summarized in petitioner's brief (p. 42) will bear any analysis. These were:

> (1) "The claimant was almost wholly illiterate and was not a regular longshoreman." Does this mean that only the literate are bound by the law? Does this mean that the Longshoremen's Act *grants* benefits to all, but imposes duties only on regular longshoremen?

(2) "That claimant knew of no representative of employer, other than the foreman who supervised him." This is relevant only to the oral notice on the job. It has nothing to do with a notice within thirty (30) days in writing. The uncontradicted proof shows that he knew the employer's name when he got his pay check. Does one need to know the name of a representative when he knows the name of the principal?

(3) "That the employer had given no specific instructions to the longshoreman as to whom to report an injury." This, of course, is a restatement of the familiar refrain that it is up to the employer, not the employee, to establish the manner in which notice is given. Upon what basis can a Deputy Commissioner, under this guise, rewrite the statute and entirely repudiate the requirement of a written notice to specified persons in a specified time on the ground that the employer has not set up an "adequate" system?

(4) "That claimant was not acquainted with the requirements regarding notice." This is another suggestion that the requirements of the law are not to be applied if unknown, in fact, to an individual concerned.

(5) "That a verbal report to the foreman was the usual method of informing this employer that an accidental injury had been suffered." There is no evidence, literally, to support this finding. But again, since subdivision (2) excuses only the failure to give a written notice, even a custom as to verbal notice is not relevant.

We think it entirely proper that the second subdivision be so construed as to not make the remaining portions of Sections 12(a) (b) (c) (d) completely meaningless. Certainly, that is what would result if *any* reason is accepted and, at least, when *all* of the reasons are based upon an assumption or a finding that the man was ignorant and did not know or had made an oral report to someone.

We are not here demanding notice for the sake of notice.

We have a case here in which the failure to give notice has adversely affected (assuming the injury) the claimant's own physical well-being and prospect of medical recovery and, if liability exists, the amount ultimately to be spent for medical and compensation benefits. The prompt payment without litigation of compensation and the furnishing of medical attention without controversy is the aim and daily habit of these repondents. They cannot fulfill their duties under this Act unless they know.

The fact still undisputed in this record is that the respondents did not, in fact, know, no matter which way the Deputy Commissioner may have ruled on what Wisby did or did not do. It is certain that no notice, in fact, ever got to the employer for effective action until seven months later.

This is important to bear in mind in appraising the escape under the second subdivision of Sec. 12(d). Inquiry under it is pertinent and material only if this Court sustains the Court of Appeals and the District Court on the question of agent in charge and no prejudice. Hence, the discussion of this problem as a basis for reversing the court below assumes that oral notice was *not* given in accordance with subsection (d), or, that oral notice was sufficient but the employer was prejudiced by lack of written notice.

The result is that the petitioner, in effect, argues that even though (a) no written notice was given in the thirty (30) days time and (b) no oral notice was given to the employer and (c) no oral notice was given to the agent in charge and (d) notice cannot be imputed to the employer by assumed notice to the immediate supervisor, or (e), even if notice was sufficient the employer was in fact prejudiced nevertheless, the doing of all or any of such things should be excused because the claimant was ignorant, a transitory worker and the employer had callously failed to set up a system to make it unnecessary to comply with the statute.

If that can happen, then why have Section 12(d) at all?

Further, on the assumption just analyzed, (that the second proviso is involved only if petitioner is overruled on all other arguments) upon what basis can this or any Court then sustain findings of a Deputy Commissioner (Petitioner's brief, p. 46), "that claimant had every reason to believe that the oral notice to his foreman was the full measure of his responsibility to the employer" and that the employer, aware of the limited education of an average longshoreman, "never even attempted to inform the men working aboard the *Southern States* that it was incumbent upon them to follow any formal reporting procedure * * * ?" This would be the height of audacity: It would be to hold that what this Court now affirms to be insufficient as a valid actual notice is, nevertheless, adequate as "an excuse".

We do not believe that the law comes that close to absurdity. Nor do we agree that the broad words used "some satisfactory reason" leaves the matter as an unbridled, unrestrained discretion by the administrator free from any standard of reasonableness and realistic fairness. The challenge of this part of the Award as "not in accordance with law" raises directly the serious constitutional implications if it is claimed that the Deputy Commissioner can act on any reason literally satisfactory to him. PANAMA REFINING CO. v. RYAN, 293 U.S. 388.

The District Court and the Court of Appeals for the Fifth Circuit have each examined this record in detail, and upon a careful consideration of the entire record have found that no satisfactory reason existed why such notice could not be given.

Conclusion

There are, in effect, three factual questions which petitioner seeks to have this Court review. These are:

(1) Whether the agent in charge had knowledge of the injury.

(2) Whether the employer was prejudiced.

(3) Whether some satisfactory reason existed why such notice could not be given.

All of these questions are factual issues to be determined upon a review of the entire record as required by the Administrative Procedure Act.

Under the review machinery of the Act the initial responsibility to determine whether the findings were supported by substantial evidence was placed on the District Judge. The District Judge, after a careful review of the entire record, found that these findings as to notice were not supported by substantial evidence.

The Court of Appeals for the Fifth Circuit was the next Court in the judicial process to review the entire record, and it, too, held that there was no substantial evidence in the record to support the Deputy Commissioner's findings.

When the Court of Appeals has made a decision, which turned essentially on the evaluation of testimony and evidence in the record as a whole, it is this Court's settled policy not to call up for review a conflict of evidence, nor to reverse a Court of Appeals simply because upon a consideration of the evidence, it might have reached a contrary result.

Mr. Justice Frankfurter stated this policy plainly, in N.L.R.B. v. PITTSBURGH STEAMSHIP COMPANY, 340 U.S. 498, at p. 503:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review

by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Court of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U.S. 543, 544, 71 L. Ed. 1193, 1194, 47 S. Ct. 663."

The case presented is a factual controversy already adequately determined by competent courts and, one which involves no really genuine pressing problem of statutory construction likely to recur.

It is therefore, respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

JOHN R. BROWN

Of Counsel:

E. D. VICKERY,
ROYSTON & RAYZOR,
877 San Jacinto Building,
Houston 2, Texas,
Attorneys for Charles Eikel and B. D. Harris, d/b/a Southern Stevedoring & Contracting Company and Texas Employers' Insurance Association

September, 1953

Copies of the within brief were served by me on Robert L. Stern, Acting Solicitor General of the United States, Washington, D. C., attorney for petitioner, by mailing copies thereof to him on this the ____ day of October, 1953.

JOHN R. BROWN